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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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STATEMENT OF CASE

This is an action to foreclose a mortgage upon Minnesota real estate consisting of an apartment house complex. The mortgage was given by a Minnesota corporation to a New York corporation. It was recorded in accordance with the provisions of Minnesota law authorizing such recording. Subsequent modifications were also recorded in accordance with Minnesota law, as well as the assignment of the mortgage to the Federal Housing Administrator. The case presented to the trial court consisted solely of the pleadings. No evidence was offered or received. It has at all times been conceded by

Respondent that the Minnesota statute, Minn. Stat. § 559.17, by its terms and by judicial construction prohibits the appointment of a receiver pending and after foreclosure, and during the period of redemption.

QUESTIONS PRESENTED FOR REVIEW

This case presents the single question: May the Court, pending a mortgage foreclosure, appoint a receiver to collect rents and profits of the mortgaged premises in a situation in which:

(i) an FHA insured mortgage between private parties contains a provision authorizing such an appointment upon default;

(ii) such provision is invalid and unenforceable under the law of the situs; and

(iii) there is no showing of waste, inadequacy of security, insolvency of the mortgagor, and no delay existent or prospective in the foreclosure proceedings?

ARGUMENT

Respondent opposes granting the petition for Writ of Certiorari and asserts as its sole reason that there is no conflict between the decision below and decisions of other Circuits or of this Court. The assertion finds no support in the cases. The Eighth Circuit's decision is in direct conflict with decisions of the Ninth Circuit,* the Fourth Circuit,** the Fifth Circuit,*** and the Supreme Court of the United States.****

1. The decision is in basic conflict with the decision of the Fifth Circuit in *United States v. Yazell*, 334 F. 2d 454 (5th Cir. 1964). This decision was filed on July 13, 1964, and was published in the Federal Reporter on September 14, 1964. Respondent has taken cognizance of its existence by producing a summary of the decision at the *end of a footnote* in its Brief in Opposition (p. 8). Respondent's Brief was filed with this Court approximately three months after the filing of *Yazell* and one month after its appearance in the official reports. And yet, nowhere in the Respondent's Brief does there appear the name of the case or its citation. It is difficult to imagine that such deception was unintentional. For the convenience of this Court, and perhaps that of counsel for Respondent, we have reproduced the *Yazell* decision and it is appended hereto as Appendix A.

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*In the cases of *United States v. View Crest Garden Apts., Inc.*, 268 F. 2d 380, *cert. denied*, 361 U.S. 884 (1959), and 281 F. 2d 844, *cert. denied*, 364 U.S. 902 (1960); and *United States v. Queen's Court Apartments, Inc.*, 288 F. 2d 253 and 296 F. 2d 534.

**In *United States v. Union Livestock Sales Co.*, 298 F. 2d 735.

***In *United States v. Yazell*, 334 F. 2d 454 (1964).

****E.g.: *United States v. Brosnan*, 363 U.S. 237; and *Meyer v. United States*, 84 S. Ct. 318 (1963).

Respondent has recently petitioned this Court for a Writ of Certiorari to review *Yazell*. The Petition contains the following:

"QUESTIONS PRESENTED

"1. Whether State or federal law is to be applied in determining the obligation of a married woman arising out of a contract executed under the Small Business Act of 1953.

"2. Whether, if federal law governs, the federal courts should fashion a uniform rule rather than adopt the diverse rules of coverture followed in the several States."

"STATEMENT

"The respondent, Ethel Mae Yazell, and her husband, were the recipients of a $12,000 loan made by the Small Business Administration pursuant to the federal program promulgated by Congress for the aid of small business (Small Business Act of 1953, 67 Stat. 232, as amended, 15 U.S.C. 631, *supra*.) The Yazells executed a note in the amount of the loan, together with a chattel mortgage on the merchandise in their jointly owned business. Upon default, the government foreclosed on the security and instituted this action against the co-makers of the note to recover the remaining deficiency. The district court entered summary judgment against Mr. Yazell in the amount of $4,719.66 (the outstanding unliquidated portion of the loan) but held that Mrs. Yazell, under Texas law, "based upon her defense of Coverture, is entitled to a summary judgment as a matter of law."

"Upon the government's appeal (Mr. Yazell did not appeal from the adverse judgment which had been entered against him), the judgment of the district court was affirmed by a divided court. The majority (Hutcheson and Jones JJ.) ruled that the Texas law of coverture controls and expressly disagreed with the Sixth Circuit's decision in *United States v. Helz*, 314 F. 2d 301 (holding that the defense of coverture accorded by State law is unavailable against the United States in an action brought

by it under the National Housing Act to recover on a federally insured loan). Judge Prettyman (sitting by designation) dissented. [The entire opinion is set out in Appendix A.]

"REASONS FOR GRANTING THE WRIT

"The federal government is engaged in various lending programs of national scope. Under the holding below, the obligations of those who enter into standard agreements pursuant to these programs would vary from State to State, depending upon local law. On the other hand, under the Sixth Circuit's rule, enunciated in the *Helz* case, the rights of the United States as lender are uniform throughout the country—which means, by the same token, that individuals throughout the country may be extended the privilege of participation on an equal basis. It is of obvious importance, we believe, that this acknowledged conflict be resolved and that the various lending agencies learn, at the earliest practicable date, whether their contracts are to be governed by fifty different sets of rules or by one set of rules. The difference that makes to the Administrator concerned needs no elaboration.

"Since the question is important and the conflict plain, we advert to the merits quite summarily. We point out that this Court has consistently ruled that the *Clearfield Trust* doctrine applies to all contracts of the United States as well as to the issuance of commercial paper. "The validity and construction of contract through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State," *United States v. Allegheny County*, 322 U.S. 174, 183. We recognize, to be sure, that this Court would be free to adopt, as a rule of federal law, the principle of reference to local law. *United States v. Brosnan*, 363 U.S. 237, 241. We shall argue, however,

> that such a rule would be particularly inappropriate here. It would, in our view, burden and complicate the administration of federal lending programs and tend to impair the achievement of objectives which are national in character." (Footnotes omitted.)

There can be no doubt that *Helz and Yazell* are in direct conflict. Further, there can be no doubt that *Yazell* and the decision here are in direct conflict. Respondent had earlier cited *Helz* to the Eighth Circuit as a case requiring the application of "federal law" to the facts of this case. To now state that *Yazell* is not in conflict with the decision here is to cast serious doubt on Respondent's citation of cases for any given proposition. The conflict is obvious and should be resolved.

The Position of Respondent in the case at bar and its position in *Yazell* are totally inconsistent. Here Respondent proclaims that the issues have been determined properly, that the decision does not conflict with any other Circuit decision, and that the issues here involved are not so important as to require review by this Court. Simultaneously, Respondent seeks review in *Yazell*, claiming that the decision there is erroneous, that it conflicts with other decisions of the Courts of Appeals, and that the issues involved are of such great importance that the decision should be reviewed by this Court. On issues which are identical, Respondent has seen fit to take diametrically opposed positions. The reasons, of course, are simple: Respondent prevailed in the Eighth Circuit and received an adverse decision in the Fifth Circuit. Although it is not surprising to witness this attempt to preserve a victory and reverse a defeat, the process by which this is sought to be accomplished necessarily eliminates a candid presentation of the issues to this Court. Petitions for Writs of Certiorari should not be, and are not, acted upon on the basis of victory or defeat for one of the parties.

We agree with the Respondent that the decision of the Fifth Circuit in *Yazell* and that of the Sixth Circuit in *Helz* are in direct conflict and should be reviewed by this Court. We only regret that Respondent has been unwilling to view objectively the decision here sought to be reviewed, and likewise urged the granting of a Writ of Certiorari.

2. The Brief of the Respondent has failed to take cognizance of the facts of this case. The Brief assumes that Respondent had established its right to the appointment of a receiver. This is in error. One need only glance at the Record herein to discover that there have been no showings of inadequacy of security, insolvency of the mortgagor, or even a default in the terms of the mortgage. *No evidence on these matters was offered by Respondent and no findings were made by the District Court.* The Record consists of a Complaint, an Answer, and an Application for the Appointment of a Receiver. To claim a default is to assert into the case the unsupported statement of counsel.

Respondent has cited no case, and presumably none exists, wherein it has been held that the mere application for the appointment of a receiver, by the United States, dictates such appointment. Every decision on the issue here involved, except the decision below, clearly holds that the party seeking the appointment must demonstrate that its security is in some way threatened. The failure to adopt this basic rule of law here places the decision below in direct conflict with *United States v. Queen's Court Apartments, Inc.*, 288 F. 2d 253, 296 F. 2d 534 (9th Cir. 1961), and *United States v. View Crest Garden Apartments, Inc.*, 268 F. 2d 380 (9th Cir. 1959), 281 F. 2d 844 (9th Cir. 1960).

3. Respondent asserts in its Brief that "this Court has consistently recognized that when the United States enters

into a large number of transactions *requiring uniform administration*, its rights and liabilities must be determined by reference to federal law." (Emphasis added.) This statement is also found in the opinion of the Eighth Circuit. As a theoretical proposition of law, it may be correct. But it cannot be applied to this or any other case unless and until it is demonstrated that the federal program involved does in fact "require uniform administration." This is the central issue to be determined.

The relevant facts all demonstrate that there is no need for uniformity here. Since Respondent cannot prove such a need, he urges this Court to *assume* it to exist. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), compels no such result.

Respondent obtained an opinion below based upon such an unproven assumption. To thus assume the sole basis for decision is not only inconsistent with the judicial function, but places the decision below, as well as those decisions from the Ninth Circuit, *supra*, in direct conflict with the Fourth Circuit's decision in *United States v. Union Livestock Sales Co.*, 298 F. 2d 755 (4th Cir. 1962):

> *"We find no need for uniformity in these transactions throughout the United States.* On the contrary, it seems to us that the interest of the Government and of the borrower will be properly protected if the local rules governing dealings in the transfer of property, which have been built up by the experience in like transactions and are familiar alike to the courts and the citizens of the several localities, are given application." (298 F. 2d at 759) (Emphasis added.)

4. Respondent also asserts, as it did in the Court below, that "the desirability of a uniform rule is plain." Such is not the case. No public monies are here involved. The FHA in-

surance program is profitable. The funds in reserve are derived from premiums paid by the mortgagor. No protection and no uniformity are required. "Protection of the Government's financial interest" has been secured by a charge for premiums which has produced a reserve far in excess of any anticipated needs.

Respondent declares that it is engaged in a nationwide insurance business. In such respect it is in no different situation than a great variety of banks, insurance companies and other financial institutions similarly engaged. Mortgages held by all such institutions are governed by the laws of the various states in which the property is situated. Such considerations do not seem to interfere with the orderly conduct of their business.

The matter can be easily documented. Respondent recites (p. 7) that by 1961 *all* FHA insured mortgages outstanding exceeded 6.5 billion dollars. Some related data on mortgages will be illustrative. The year in each instance is 1961.

Total farm mortgage debt	$ 12,812,000,000*
Farm mortgage debt held by insurance companies	2,375,000,000
Farm mortgage debt held by banks	1,686,000,000
Total real estate mortgages held by insurance companies	44,203,000,000
Net private non-farm mortgage debt	190,100,000,000.

Of the last figure, approximately $153,083,000,000 represents mortgages held on 1 to 4 family non-farm homes.

It can be safely assumed that at least the insurance companies insist upon some geographic diversification of mort-

*All figures are from the *Economic Almanac 1964*, National Industrial Conference Board, pp. 172, 408, 459, 461.

gage holdings. In any event, if we assume that all of the FHA insured mortgages and loans are private non-farm mortgages, the net of such non-FHA insured mortgages in 1961 exceeded 184 billions of dollars. Mortgagees holding that size investment somehow manage to accommodate themselves to "the vagaries of the laws of the several states."

It is difficult to imagine that Respondent cannot accommodate itself to the same financial and legal aspects of the mortgage business as do all others who hold mortgages on real estate in various places in the United States.

Respondent's claimed involvement of 6.5 billion dollars is grossly misleading. In 1962, .31 of 1% of the Title 608 units were in default, and only .06 of 1% of the units insured were being assigned.* If the unit figure is correlative to dollars involved, the FHA's concern in *really only $3,900,000.* If we assume that each one so assigned is realized only to the extent of 50%, this "vast" program amounts to $1,950,000.

5. Respondent has ignored, as did the Court below, the language of the Regulations relevant to the issues here:

"1949 Edition, Code of Federal Regulations, §280.18:

> "The mortgage must contain a provision or provisions satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered by the mortgage and the income therefrom, *as are available under the law or custom of the jurisdiction.* (Emphasis supplied.)

"1949 Edition, Code of Federal Regulations, §382.2 (c):

> "The term 'mortgage' means such first lien upon real

*Housing and Home Finance Agency, *16th Annual Report*, Table III-27.

estate and other property as is commonly given to secure advances (including but not being limited to advances during construction) on, or the unpaid purchase price of, real estate *under the laws of the State, District or Territory in which the real estate is located,* together with the credit instrument or instruments, if any, secured thereby. (Emphasis supplied.)

"1949 Edition, Code of Federal Regulations, §282.8 (b):

"(2) Institute proceedings for the foreclosure of the mortgage and obtain possession of the mortgaged property and the income therefrom through the voluntary surrender thereof by the mortgagor or institute, and prosecute with reasonable diligence, *proceedings for the appointments of a receiver of the mortgaged property and the income therefrom* or proceed to exercise such other rights and remedies as may be available to it for the protection and preservation of the mortgaged property and the income therefrom *under the mortgage and the law of the particular jurisdiction: Provided, that if the laws of the State in which the mortgaged property is situated do not permit the institution of such proceedings within such period of time, the mortgagee shall institute such proceedings within sixty (60) days after the expiration of the time during which the institution of such proceedings is prohibited by such laws.* (Emphasis added.)

To read the above Regulations and conclude that "there is no indication that the right to obtain foreclosure is to be governed by State law," as Respondent has concluded, is a striking example of the proposition that there are "*none so blind as those that will not see.*"

CONCLUSION

Respondent proclaims strenuously for the application of a uniform federal rule. It is doubtful that such uniformity could ever be achieved in this field which is "an area of complex property relationships long since settled and regulated by state law." *United States v. Brosnan*, 363 U.S. 237 (1960). The Court there continued:

> "We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests by displacing well-established state procedures governing their enforcement, or super-imposing on them a new federal rule."

As stated in Mishkin, *The Variousness* of "Federal Law," 105 U. Pa. L. Rev. 797, 831:

> "The only real gain would seem to be in the work of legal counsel to the Treasury [here FHA] and in a certain symmetry of the law. While both of these certainly have appeal and perhaps some real value, this importance may be overrated."

No need for uniformity having been shown, State law must be applied. The decision below should be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
Appellant

v.

DELBERT L. YAZELL, D B A YAZELL'S LITTLE AGES, and ETHEL MAE YAZELL
Appellees

No. 21154

United States Court of Appeals
Fifth Circuit

July 13, 1964

Before HUTCHESON, PRETTYMAN, and JONES, Circuit Judges.

HUTCHESON, Circuit Judge:

This appeal is by the United States from a judgment sustaining the appellee's defense of coverture on a note executed under a contract entered into under a federal program authorized by congress for the aiding of small business. The suit was against appellee and her husband, and the judgment against the husband is not appealed from. The sole issue was and is whether the law of Texas, where the contract was made, that a married woman is protected by coverture from personal liability upon a contract, is controlling here, or whether, since the transaction was a transaction with the federal government, the Texas law of coverture is nullified and abrogated.

The district judge, sustaining Mrs. Yazell's plea of coverture, followed Texas law as it has been uniformly declared:

> "*With the adoption of the common law as the rule of decision in this state, in 1840, our married women were rendered unable to bind themselves by contract.* Kavanaugh v. Brown, 1 Tex. 481. And although by statute we

> retained the Spanish law rule that the wife can own property, our adoption of the common law meant that she can contract with respect to it or otherwise only for a purpose pointed out by law and only in such manner as our statutes may permit. Graham et al. Struwe (Struve) et al., 76 Tex. 533, 13 S.W. 381; Speer's Law of Marital Rights, 3rd Ed., Sec. 167, p. 226." (Emphasis added.) Tolbert v. Standard Acc. Ins. Co., 148 Tex. 235 at p. 238, 223 S.W. 2d 617 at 619.

and the Texas law of coverture is the controlling law. This applies just as well to government groups and the United States as to anybody else. In short, this is not a case like the cases relied on by the United States of federal commercial paper issued by and as an obligation of the United States. This is a simple case of trying to hold a married woman liable on a contract which under the laws of Texas she was incapable of making, and the claim is no more reasonable than to hold that a minor, or one of unsound mind, could be held liable on a contract despite his disability merely because the United States was a party to it. There is nothing in this view, and we are in no doubt that the decision of the district judge should be affirmed.

The contention of the United States, that because the promissory note sued on was payable to The Small Business Administration, the Texas law as above set forth is not controlling here, is completely unfounded, and we reject as without authority here the opinion of the Sixth Circuit, in United States v. Helz, 314 F. 2d 301, as we reject appellant's contention that the fact that the Small Business Administration is a party to the note sued on nullifies or has any effect on the incapacity of Mrs. Yazell to bind herself by contract.

The district judge was right in his decision. His judgment is affirmed.

PRETTYMAN, Senior Circuit Judge (dissenting):

Mrs. Yazell and her husband, trading as a partnership, borrowed money from the Federal Government through the Small Business Administration. They signed a note for the loan. They also signed, as security for the loan, a chattel mortgage on the merchandise in their store. They could not pay, and the Government foreclosed on the security. A deficiency remained. The Government sued on the note, praying judgment for the balance of the loan. Mrs. Yazell moved for summary judgment on the ground that she is a married woman and so, in Texas, no personal judgment and no judgment affecting her separate estate can be rendered against her, with a few exceptions not here material. The District Court judge agreed with her, and so do my brethren on this court. I am contrari-minded.

A loan from the Federal Government is a federal matter and should be governed by federal law. There being no federal statute on the subject, the courts must fashion a rule. This is the clear holding of Clearfield Trust Co. v. United States.

To effectuate the policy of the Small Business Act, loans of many hundreds of thousands of dollars each year to businesses must be made throughout the country. These loans can be made only under conditions which will reasonably assure repayment. I think the Act should be of uniform application throughout the country. If local rules are to govern federal contracts in respect to the capacity of married women to contract, so too should local rules as to all other features of contractual capacity govern such contracts. Chaos which would

nullify federal programs for disaster relief would arise. And of course there is no reason to restrict this decision to loans under the Small Business Act. It would necessarily apply with equal force to every other federal program which involves contracts between the Federal Government and individuals. A multitude of programs will be frustrated by it.

It seems to me that, if a person has capacity to get money from the Federal Government, he has the capacity to give it back. The present lawsuit does not involve a general liability for debt; it involves merely the obligation to repay to the Government specific money borrowed from the Government. It seems to me that if a person borrows a horse from a neighbor he ought to be required to give it back if the owner wants it back, whether or not the borrower is a married woman. I suppose the Texas law, by nullifying repayments by married women, tends to minimize ill-advised borrowing. But I think the federal rule ought to be that you must repay what you borrow.

It seems to me that United States v. Helz was correctly decided by the Sixth Circuit and that it applies here. I would follow it. (Citations omitted.)